

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES S. GORDON, JR.,
Plaintiff,

v.

ASCENTIVE, LCC, a Delaware
limited liability company; ADAM
SCHRAN, individually and as part
of his marital community; JOHN
DOES I-X,
Defendants.

No. CV-05-5079-FVS

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS

THIS MATTER comes before the Court on the Defendants' Motion to Dismiss the First Amended Complaint, Ct. Rec. 98. The Plaintiff is represented by Robert J. Siegel. The Defendants are represented by Floyd E. Ivey.

BACKGROUND

The Plaintiff, James S. Gordon, is a Washington resident and the registered user of the internet domain name "gordonworks.com." The Defendants are Ascentive, LLC ("Ascentive"), a Delaware Limited Liability Company, and its manager, Adam Schran. Ascentive makes and markets personal computer software. Customers purchase Ascentive's software by accessing Ascentive's website, making an online payment, and then either downloading the software or paying to have it shipped.

The Plaintiff initiated the present lawsuit on July 20, 2005,

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1 alleging that Ascentive violated Washington's Commercial Electronic
2 Mail Act ("CEMA"), RCW § 19.190 et seq., and Washington's Consumer
3 Protection Act ("CPA"), RCW § 19.86 et seq., by sending unsolicited
4 commercial emails to various addresses at Plaintiff's domain,
5 "gordonworks.com." On April 12, 2006, the Court granted the
6 Plaintiff's request to amend the Complaint to include claims under the
7 Federal CAN-SPAM Act (15 U.S.C. § 7701 et seq.), Washington's
8 Deceptive Offers statute (RCW § 19.170), and Washington's Identity
9 Crimes statute (RCW § 9.35). The Court also gave the Plaintiff leave
10 to name additional an defendant, Adam Schran, the CEO and managing
11 member of Ascentive. (Ct. Rec. 84.) The Plaintiff filed his First
12 Amended Complaint ("FAC") on April 13, 2006. The Defendants now move
13 to dismiss the FAC on a variety of grounds.

14 DISCUSSION

15 I. SUBJECT MATTER JURISDICTION

16 This Court has subject matter jurisdiction pursuant to 28 U.S.C.
17 § 1332. Under section 1332, the federal district courts have original
18 jurisdiction to hear civil cases where the parties are citizens of
19 different states and more than \$75,000 is in controversy. The
20 Plaintiff is a Washington resident. The Defendants are a Delaware
21 limited liability company and a citizen of the State of Pennsylvania.
22 FAC ¶¶ 1.1-1.5. The Plaintiff alleges more than \$75,000 in damages.
23 FAC ¶ 2.5. Subject matter jurisdiction is therefore proper in this
24 case.

25 II. LEGAL STANDARD

26 Under Federal Rule of Civil Procedure 12(b)(6), a trial court may

1 dismiss a complaint that fails to state a claim upon which relief can
2 be granted. Such dismissal is proper, "only when there is no
3 cognizable legal theory or an absence of sufficient facts alleged to
4 support a cognizable legal theory." *Siaperas v. Mont. State Comp.*
5 *Ins. Fund*, 480 F.3d 1001, 1003 (9th Cir. 2007). For the purposes of a
6 12(b)(6) motion, all factual allegations set forth in the complaint
7 are taken as true and construed in the light most favorable to the
8 plaintiff. *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.
9 1996). The Court must give the plaintiff the benefit of every
10 inference that reasonably may be drawn from well-pleaded facts. *Tyler*
11 *v. Cisneros*, 136 F.3d 603, 607 (9th Cir. 1998).

12 "Once a claim has been stated adequately, it may be supported by
13 showing any set of facts consistent with the allegations in the
14 complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969
15 (2007) (internal citations omitted). However, the Court is not
16 required to accept as true conclusory allegations, legal
17 characterizations, unreasonable inferences, or unwarranted deductions
18 of fact. *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir.
19 1996). "In practice, a complaint must . . . contain either direct or
20 inferential allegations respecting all the material elements necessary
21 to sustain recovery under some viable legal theory." *Twombly*, 127 S.
22 Ct. at 1969 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d
23 1101, 1106 (7th Cir. 1984) (ellipsis and emphasis in original)).

24 The parties have submitted a number of declarations in support of
25 their briefing on the motion to dismiss. A court may not generally
26 consider material beyond the pleadings in ruling upon a motion to

1 dismiss. *Thompson v. Davis*, 295 F.3d 890, 896 n.3 (9th Cir. 2002).
2 If the Court were to rely on the declarations submitted by the
3 parties, the Court would be obliged to convert the motion to dismiss
4 into a motion to for summary judgment. *Jackson v. Southern California*
5 *Gas Co.*, 881 F.2d 638, 643 n.4 (9th Cir. 1989). This the Court
6 declines to do, as the proper time for consideration of declarations
7 is generally at summary judgment, after both parties have had an
8 opportunity to conduct discovery. The Defendants' Motion to Strike
9 Portions of the Declaration of James S. Gordon, Jr., is therefore
10 moot.

11 **III. COMMERCIAL ELECTRONIC MAIL ACT**

12 Under Washington's Commercial Electronic Mail Act ("CEMA"), it is
13 illegal to transmit email that misrepresents its point of origin,
14 misrepresents its transmission path, or contains false information.
15 Wash. Rev. Code § 19.190.020. The statute authorizes an individual
16 who receives emails that violate CEMA to bring an action to recover
17 damages. Wash. Rev. Code § 19.190.040(1). Interactive computer
18 services injured by such emails may also recover damages. Wash. Rev.
19 Code § 19.190.040(2). An "interactive computer service" is,

20 any information service, system, or access software provider
21 that provides or enables computer access by multiple users
22 to a computer server, including specifically a service or
23 system that provides access to the internet and such systems
24 operated or services offered by libraries or educational
25 institutions.

26 Wash. Rev. Code § 19.190.010(8). The statute provides separate
definitions for "domain name" and "web page." Wash. Rev. Code §
19.190.010 (10), (13). CEMA further provides that it is illegal to

1 use email to induce a person to provide identifying information.
2 Wash. Rev. Code § 19.190.080. Private individuals may bring civil
3 actions for damages for violations of this subchapter. Wash. Rev.
4 Code § 19.190.090(1). The owner of a web page who has been "adversely
5 affected" by a violation of Section 19.190.80 may also bring suit.
6 Wash. Rev. Code § 19.190.090(2).

7 The Defendants argue that Gordon, as an individual bringing suit
8 on behalf of himself, does not have standing to pursue his CEMA claim
9 because he does not qualify as an "interactive computer service." The
10 Plaintiff responds that Gordon qualifies as an interactive computer
11 service because he makes information available to thousands of
12 computer users on his website. The Court does not find either party's
13 briefing on this issue persuasive. The parties have neither cited
14 case law nor defined the technical terms at issue in the definition.
15 If the interpretation of the term "interactive computer service"
16 presents a question of first impression, analysis beyond recitation of
17 the statutory language will be necessary.

18 Moreover, even if the Plaintiff does not qualify as an
19 interactive computer service, he may still seek recovery under Section
20 19.190.020 for those emails he received personally. He may also seek
21 recovery for the injuries he suffered personally and the adverse
22 effects the Defendants' conduct had on him as a provider of internet
23 access service under Section 19.190.080. Dismissal of the Plaintiff's
24 CEMA claim is therefore denied.

25 **IV. CONSUMER PROTECTION ACT**

26 In order to state a cause of action under Washington's Consumer
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1 Protection Act ("the CPA"), a plaintiff must allege five elements:

2 (1) an unfair or deceptive act or practice, (2) in trade or
3 commerce, (3) that impacts the public interest, (4) which
4 causes injury to the party in his business or property, and
5 (5) the injury must be causally linked to the unfair or
6 deceptive act.

7 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.
8 2d 778, 785-86, 719 P.2d 531, 535-37 (Wash. 1986). Conduct that
9 violates CEMA constitutes "an unfair or deceptive act in trade or
10 commerce" for the purposes of the CPA. Wash. Rev. Code § 19.190.100.

11 The Defendants imply that the Plaintiff lacks standing to bring
12 his CPA claims because Gordon does not qualify as an interactive
13 computer service. Given that the Defendants have failed to persuade
14 the Court that the Plaintiff is not an interactive computer service,
15 the Plaintiff may yet be able to prove that the Defendants engaged in
16 an unfair or deceptive trade practice by violating CEMA. Dismissal of
17 the Plaintiff's CPA claim is therefore inappropriate.

18 **V. THE CAN-SPAM ACT**

19 The Controlling the Assault of Non-Solicited Pornography and
20 Marketing Act ("CAN-SPAM") attempts to decrease the problems
21 associated with commercial electronic mail by prohibiting a number of
22 emailing practices. 15 U.S.C. § 7701 *et seq.* While CAN-SPAM is
23 generally enforced by the Federal Trade Commission, providers of
24 "internet access service" may also seek relief under CAN-SPAM. 15
25 U.S.C. § 7706(g)(1). For the purposes of CAN-SPAM, "'Internet access
26 service' has the meaning given that term in section 231(e)(4) of the
Communications Act of 1934." 15 U.S.C. § 7702(11). The
Communications Act defines "internet access service" as

1 a service that enables users to access content, information,
2 electronic mail, or other services offered over the
3 Internet, and may also include access to proprietary
4 content, information, and other services as part of a
5 package of services offered to consumers. Such term does
6 not include telecommunications services.

7 47 U.S.C. § 231(e)(4).

8 The Defendants argue that the Plaintiff does not have standing to
9 bring claims under CAN-SPAM because Gordon, as an individual bringing
10 suit on behalf of himself, is not an internet access service. The
11 Plaintiff responds that he is an internet access service because, as
12 the sole proprietor of gordonworks.com, he enables the site's users to
13 access content and email on the Internet.

14 The Court is not persuaded that dismissal of the Plaintiff's CAN-
15 SPAM claim is appropriate. The parties agree that CAN-SPAM defines
16 "internet access service" in terms of what the entity in question does
17 rather than in terms of the entity's ownership structure. The
18 Plaintiff has made a logical argument that his activities qualify him
19 under this definition. In contrast, the Defendants have not provided
20 any analysis in support of their argument that an individual who
21 operates a domain name may not qualify as an internet access service.
22 While the Defendants do point to a secondary source that supports
23 their position, the persuasive value of this unbinding authority is
24 negated by the absence of analysis. Dismissal of the Plaintiff's CAN-
25 SPAM claim at this stage of the litigation would be premature.

26 VI. THE PRIZE STATUTE

Washington's Prize Statute prohibits the deceptive promotional
advertising of prizes. Wash. Rev. Code § 19.170.010 *et seq.* "A

1 person who suffers damages" as a result of such advertizing practices
2 may bring a cause of action to recover damages. Wash. Rev. Code §
3 19.170.060. The FAC alleges that the Defendants transmitted emails
4 that violated the Prize Statute in unspecified ways. FAC ¶¶ 4.3.1-
5 4.3.2. However, the FAC does not allege that the Plaintiff suffered
6 damages as a result of Defendants' alleged violations of the Prize
7 Statute. The absence of this necessary element requires dismissal of
8 the Prize Statute claim unless the Plaintiff is granted leave to amend
9 the FAC.

10 Although the Plaintiff has not moved to amend the FAC, the Court
11 deems it just to grant the Plaintiff leave to allege damages under the
12 Prize Statute. This change will not prejudice the Defendants, as the
13 FAC gave them notice that the Plaintiff intended to pursue a claim
14 under the Prize Statute. Nor will amending the FAC to allege damages
15 under the Prize Statute prove futile, as this amendment will save the
16 Prize Statute claim from dismissal.

17 **VII. VAGUENESS**

18 Under the notice pleading requirements of the Federal Rules of
19 Civil Procedure, a complaint in a civil suit must contain "a short and
20 plain statement of the grounds upon which the court's jurisdiction
21 depends." Fed. R. Civ. P. 8(a)(1). "The 'short and plain statement'
22 must provide the defendant with 'fair notice of what the plaintiff's
23 claim is and the grounds upon which it rests.'" *Dura Pharm., Inc. v.*
24 *Broudo*, 544 U.S. 336, 346, 125 S. Ct. 1627, 1634, 161 L. Ed. 2d 577,
25 588 (2005) (citing *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99,
26 103, 2 L. Ed. 2d 80, 85 (1957)). To satisfy this standard, the

1 plaintiff's complaint should set forth allegations respecting all
2 material elements of a particular claim. *Brennan v. Concord EFS,*
3 *Inc.*, 369 F. Supp. 2d 1127, 1130 (N.D. Cal. 2005).

4 A complaint may properly be dismissed when it is "vague,
5 conclusory, and general and does not set forth any material facts in
6 support of the allegations." *North Star Int'l v. Arizona Corp.*
7 *Comm'n*, 720 F.2d 578, 583 (9th Cir. 1983). More specifically,
8 dismissal is appropriate when "one cannot determine from the complaint
9 who is being sued, for what relief, and on what theory, with enough
10 detail to guide discovery." *Jacobson v. Schwarzenegger*, 357 F. Supp.
11 2d 1198, 1205 (C.D. Cal. 2004) (quoting *McHenry v. Renne*, 84 F.3d 1172,
12 1178 (9th Cir. 1996)).

13 The Defendants argue that the FAC fails to satisfy the
14 pleading requirements of Rule 8 because it is vague and consists
15 entirely of conclusory allegations. While the Court is troubled by
16 the vague and conclusory nature of the FAC, the FAC does provide the
17 Defendants with "fair notice" of the nature of the Plaintiff's claims.
18 Unlike the complaint dismissed in *Jacobson*, one can determine the
19 identity of the defendants, the relief sought, and the theories
20 alleged in the FAC. It is also possible to proceed with discovery by
21 seeking the emails at issue.

22 **IX. MOTION FOR A MORE DEFINITE STATEMENT**

23 A defendant may move for a more definite statement when the
24 complaint is "so vague or ambiguous that a party cannot reasonably be
25 required to frame a responsive pleading." Fed. R. Civ. P. 12(e). A
26 motion for a more definite statement is not a remedy for a lack of

1 detail, however. *Sheffield v. Orius Corp.*, 211 F.R.D. 411, 414-15 (D.
2 Or. 2002); *Castillo v. Norton*, 219 F.R.D. 155, 163 (D. Ariz. 2003).
3 Motions for a more definite statement are disfavored, leading some
4 district courts to conclude that such motions should be denied if the
5 missing information may be obtained through discovery. *Castillo*, 219
6 F.R.D. at 163; *Davison v. Santa Barbara High School District*, 48 F.
7 Supp. 2d 1225, 1228 (C.D. Cal. 1998).

8 The Defendants request an order compelling the Plaintiff to
9 provide, for each and every allegedly offensive email:

- 10 1) The address to which it was sent;
- 11 2) The date on which it was sent;
- 12 3) The basis upon which the Plaintiff claims it violates a
13 statute; and
- 14 4) The basis upon which the Plaintiff claims the Defendants
15 sent it.

16 (Ct. Rec. 104 at 8.) The Plaintiff argues that all of the information
17 the Defendants seek has been provided in discovery.

18 The Court finds that the nature of the Plaintiff's claims,
19 combined with the vagueness of the FAC, presents an exceptional
20 circumstance that warrants a more definite statement. While the FAC
21 provides notice concerning the nature of the Plaintiff's claims, it is
22 nevertheless so ambiguous that the Defendants cannot reasonably be
23 expected to frame a responsive pleading. Specifically, the FAC does
24 not identify the emails at issue. Without such identification, the
25 Defendants have no way of knowing if they should "admit" or "deny"
26 sending the emails. Nor is it possible to "admit" or "deny" that an

1 email violates any of the statutes at issue without first knowing the
2 content of the email.

3 Even if the Defendants have been provided with the emails through
4 discovery, a more definite statement is necessary to prevent the
5 Plaintiff from presenting a moving target. While not all of the
6 information requested by the Defendants is necessary to achieve this
7 end, the Plaintiff must identify the emails at issue, the time frame
8 during which they were sent, and the basis upon which he claims the
9 Defendants sent the emails. Attempting to litigate a claim without
10 first identifying the acts and documents that gave rise to the claim
11 is contrary to the "just, speedy, and inexpensive determination of the
12 action" required by Federal Rule of Civil Procedure 1.

13 CONCLUSION

14 Following this Court's disposition of the Defendant's Second
15 Motion to Dismiss, the Plaintiff may continue to pursue his claims
16 under Washington's Commercial Electronic Mail Act, Washington's
17 Consumer Protection Act, Washington's Deceptive Offers statute,
18 Washington's Identity Crimes statute, and the federal Controlling the
19 Assault of Non-Solicited Pornography and Marketing Act. The
20 Plaintiff's may amend the FAC to allege damages under the Prize
21 Statute. Finally, the Plaintiff must provide the Defendants with a
22 more definite statement as specified below. Accordingly,

23 IT IS HEREBY ORDERED:

24 1. The Defendants' Motion to Strike Plaintiff's Response, **Ct.**
25 **Rec. 106**, is **DENIED**.

26 2. The Defendants' Motion to Dismiss the First Amended Complaint,

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1 **Ct. Rec. 98, is GRANTED IN PART and DENIED IN PART.**

2 3. The Plaintiff may amend Section 4.3 of the First Amended
3 Complaint to allege damages under the Prize Statute.

4 4. The Plaintiff shall file a more definite statement
5 identifying:

6 a) The number of emails at issue;

7 b) The time frame during which the emails were sent;

8 c) The addresses and domain names that received the emails;
9 and

10 d) A brief summary of the factual basis upon which the
11 Plaintiff claims that Impulse sent the emails.

12 5. The Defendants' Motion to Expedite Defendants' Motion to
13 Strike Plaintiff's Response, **Ct. Rec. 109, is DENIED AS MOOT.**

14 6. The Defendants' Motion to Strike Portions of the Declaration
15 of James S. Gordon, Jr., **Ct. Rec. 112, is DENIED AS MOOT.**

16 7. The Defendants' Motion to Expedite Defendants' Motion to
17 Strike Portions of the Declaration of James S. Gordon, Jr., **Ct. Rec.
18 115, is DENIED AS MOOT.**

19 **IT IS SO ORDERED.** The District Court Executive is hereby
20 directed to enter this order and furnish copies to counsel.

21 **DATED** this 19th day of June, 2007.

22 s/ Fred Van Sickle
23 Fred Van Sickle
24 United States District Judge
25
26